United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7230

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNETTE HEYMAN

v.

COMMERCE AND INDUSTRY INSURANCE COMPANY

B P/s

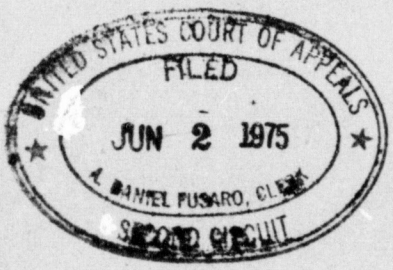
U. S. District Court, District of Connecticut,
Civil No. B 74-330

U. S. Court of Appeals, Second Circuit,
Civil No. 75-7230

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF DEFENDANT-APPELLANT

May 5, 1975



John Keogh, Jr.
Attorney for
Defendant-Appellant

James J. Farrell
On The Brief

Keogh, Candee & Burkhart
34 Wall Street
P. O. Box 126-Belden Sta.
Norwalk, Connecticut 06852

1

TABLE OF CONTENTS

CITATIONS

CASES:

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNETTE HEYMAN

v.

COMMERCE AND INDUSTRY INSURANCE COMPANY

U. S. District Court, District of Connecticut,
Civil No. B 74-330

U. S. Court of Appeals, Second Circuit,
Civil No. 75-7230

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF DEFENDANT-APPELLANT

May 5, 1975

ISSUE PRESENTED

Whether the District Court erred in granting a summary judgment in favor of the plaintiff, when there were genuine issues as to material facts raised by the defendant's affidavits.

STATEMENT OF THE CASE

Preliminary Statement

This is an appeal taken to this Court by the defendant, Commerce and Industry Insurance Company from the entry of summary judgment in favor of the plaintiff by the United States District Court for the District of Connecticut (Clarie, C.J.) on March 25, 1975. The plaintiff and defendant moved for summary judgment in the District Court, the defendant's motion for summary judgment being denied.

STATEMENT OF FACTS

The plaintiff brought an action for damages for an alleged breach of a settlement agreement made to compromise a claim on a policy of insurance issued by the defendant. The plaintiff's claim is based on a fire loss sustained at a property located in Westfield, Massachusetts. The insured building, a commercial structure, comprised an area of approximately fourteen thousand (14,000) square feet.

The defendant disputed the actual amount of the loss claimed by the plaintiff. The plaintiff, being represented by her son, Attorney Samuel Heyman agreed with the defendant's representative, Eugene W. Fitzgerald, Assistant Vice-President of Toplis and Harding, Inc., Insurance Adjustors, that the actual cash value of the property damaged was one hundred and fifty thousand dollars ($150,000.00). The plaintiff's and defendant's representatives further agreed that if the building were to be substantially restored to its condition prior to the loss, the replacement cost would be one hundred and eighty-seven thousand five hundred dollars ($187,500.00). The plaintiff was paid one hundred and fifty thousand

dollars ($150,000.00) and would receive an additional thirty-seven thousand dollars ($37,500.00) when the building was substantially restored to its previous condition.

Attorney Samuel Heyman, as plaintiff's representative prepared an agreement which evidenced in part the understanding of the parties concerning this loss. Also participating in the negotiation and compromise of the claim was Attorney Max Gwertzman of New York City, counsel for the defendant, whose affidavits underscore the facts as related above.

When the defendant was notified by the plaintiff that the walls and roof of the building had been completed, it sent its representative, Eugene W. Fitzgerald, to the construction site of the new building. Fitzgerald, discovering that the new building comprised an area of only approximately four thousand (4,000) square feet, notified the defendant that the plaintiff had failed to reconstruct the building as agreed and was therefore not entitled to receive the additional thirty-seven thousand five hundred dollars ($37,500.00).

The District Court had before it two affidavits executed by Attorney Max Gwertzman and two affidavits executed by Eugene W. Fitzgerald, all of which firmly stated that the parties agreed that the plaintiff would not be entitled to receive an additional thirty-seven thousand five hundred ($37,500.00) dollars unless the building that was subsequently erected would be substantially the same size as that which it was to replace.

ARGUMENT

The defendant's affidavits should be construed in the light most favorable to the defendant, the party oppos-

ing the motion for summary judgment. The defendant submitted four affidavits from the individuals who represented the defendant in the negotiations which culminated in the settlement agreement now in controversy. The affidavits introduced, amply demonstrated that there existed several material issues of fact concerning the understanding of the parties, which should not be resolved in a motion for summary judgment. The relevant portions of those affidavits indicated:

> "... after considerable discussion with representatives of the plaintiff, (we) finally arrived at an actual cash value of the property damaged as $150,000.00 and it was agreed that if the building was substantially restored to the same condition as it existed before the loss, the replacement cost would be $187,500.00"
>
> from Eugene W. Fitzgerald's affidavit of November 1, 1974
>
> "... a meeting which resulted in an agreement to pay the sum of $150,000.00 as the actual cash value of the building which was the subject matter of the loss ... it was specifically agreed that the replacement value of the building in approximately the same condition that existed prior to the loss, would be $187,500.00 and that when the building was replaced substantially as it existed before the loss ... the additional payment of $37,500.00 would be made."
>
> Attorney Max Gwertzman's affidavit, dated November 1, 1974.

Despite these statements in the affidavits, the District Court asserted in its opinion that:

> "There is no evidence that either the plaintiff or her agents ever made any representations that the

new building would be identical in size with the one destroyed or that the amount of the settlement was predicated on that assumption." (Ruling Page 6)

It has been frequently stated in this Court as well settled law that, in ruling on a motion made under Rule 56 of the Federal Rules of Civil Procedure, if the opposing party's allegations in the pleadings are supported by affidavits, or other evidentiary material, they must be taken as true in ruling on the motion. **First National Bank of Cincinnati v. Pepper**, 454 F.2d 626 (C.A. 2d, 1974); **Zell v. American Seating Co.**, 138 F.2d 641 (C.C. A. 2nd 1943). The rule has also been stated that the party defending a summary judgment motion is allowed to prevail in those instances where there is even raised the "slightest doubt" as to the facts. **Devex Corporation v. Houdaille Industries, Inc.**, 382 F.2d (C.A. 5th Cir. 1967); **Appelgate v. Top Associates, Inc.**, 425 F.2d 92 (C. A. 2d 1970); **Goodis v. United States Artists Television, Inc.**, 425 F.2d 397 (C.A. 5th Cir. 1967) 405; **Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.**, 479 F.2d 135 (C.A. 5th Cir. 1973).

Upon review by this Court, the defendant, as the party defending the motion, should receive the benefit of all doubt as to the propriety of granting the motion in the District Court. **U.S. v. Diebold, Inc.**, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962) **Pollar v. Columbia Broadcasting Systems**, 368 U.S. 464, 82 S. Ct. 486, 491 (1961). The District Court's judgment should therefore be reversed on the basis of the affidavits submitted.

In addition to the requirement that the affidavits submitted must be construed in the defendant's favor, the court should also construe the agreement of August 2, 1973, most strongly against the plaintiff as draftsman of the agreement. The August 2, 1973 agreement cannot be read so as to find an unconditional promise made by the defendant to pay the additional thirty-seven thousand

five hundred dollars ($37,500.00), in the event that the original building was not actually replaced. If the plaintiff's present assertion, that the defendant made an unconditional promise, was the contractual intent of the parties, then as draftsman of the contract, this benefit to the plaintiff should have been clearly inserted by the plaintiff. It is elementary contract law that a written agreement should, in case of doubt, be construed against the party who drew it. **12 Am. Jur. Contracts**, Sec. 252; **Calderon v. Atlas S. S. Company**, 170 U.S. 272, 42 L. Ed. 1033, 18 S. Ct. 588. This is also the firmly established rule in Connecticut, see, **Greenwich Contracting Company v. Bonwit Construction Company**, 156 Conn. 123 at 130, and the cites therein.

The operative elements of the contract are clearly conditional in nature, in that the defendant conditioned its payment to be made in two installments, so as to assure that the plaintiff had in fact built an equivalent structure. The defendant reserved its final payment until the premises had reached the stage of construction where they could be visually inspected to insure that the building had actually been replaced. The final payment was to be made when the walls and roof of the building had been completed, that is when the limits of the building would be visible. It is certain that the defendant was not conditioning its payment upon the construction of a "water tight" building, which would have been irrelevant to the defendant. The precise situation which the defendant wished to protect itself against is the very subject of this action, in that the building the plaintiff erected on the premises comprised an area of only four thousand (4,000) square feet.

It is clear that the defendant conditioned its obligation on the erection of a building. The fact that the size, shape and other elements of the building were not delineated in the August 2, 1973 agreement, demonstrates that it was

not a total statement of their understanding. It will be for the court to determine, upon the presentation of evidence, what was to be the size and cost of the building substituted, as well as the defendant's obligation to pay for the construction of said building.

The plaintiff, draftsman of the compromise agreement, claims that the defendant was under an unconditional promise to pay one hundred eighty-seven thousand five hundred dollars ($187,500). No where in the agreement of August 2, 1973 does the word "unconditional" appear, nor does it permit an interpretation that any payment other than the one hundred and fifty thousand dollars ($150,000.00) actual cash value is absolute. The plaintiff cannot now claim that **her** contract contains any such expressed terms or implied conditions when the agreement is read as a whole. The very fact that two payments are to be made underscores the conditional nature of the parties' agreement, which is evidenced in part by the August 2, 1973 writing. It is not customary for a settlement, let alone an "unconditional" settlement, to be paid by installment payments, unless the party making those payments is financially unable to pay by a single payment.

The defendant cannot be considered to be within that class of defendants who would be unable to make a lump sum settlement for a claim. It is obvious that the installment payments were for the defendant's benefit, but the exact nature and extent of that benefit can only be determined by a plenary trial where the defendant will have the opportunity to demonstrate its understanding of the agreement.

The third whereas clause in the August 2, 1973 writing evidences the parties' understanding that an equivalent building would be substituted in place of the damaged building. The defendant, conditioning its final payment

on the restoration of the damaged structure, was entitled to rely on the common and ordinary usage of the term replace, that is to substitute with an equivalent. A number of courts have had the opportunity to define the word replace in actions between the insurer and the insured, and have in the great majority defined the word as does **Black's Law Dictionary**, "to place again, to restore to a former condition"; "replace, given its plain, ordinary meaning, means to supplant with a substitute or equivalent," **Olenick v. Government Employees' Ins. Co.**, 42 A. D. 2d 760, 346 N.Y.S. 2d 320; "replace means to place again, to restore to a former condition," **Congress Bar and Restaurant, Inc. v. Transamerica Insurance Company**, Wis. 2d 56, 165 N.W. 2d 409; "replace is to provide or to produce a substitute or equivalent in place of a person or thing," **Nationwide Mutual Insurance Company v. Mast**, 153 A.2d 893, 895; "replace" used in a policy of insurance, means the restoring of the insured property to substantially the same condition in which it was immediately prior to the damage," **Grubbs v. Foremost Insurance Co., Grand Rapids**, 141 N.W. 2d 777, at 778; see also, **Anderson v. Rexroad**, 180 Kan. 505, 306 P. 2d 137.

The plaintiff cited three cases in the District Court which allegedly substantiate her claim that "replacement" does not mean the substitution of an equivalent structure. The first of these, **Lannon, et al v. Board of Mayor and Alderman of Town of Tullahand**, 290 S.W. 8, 10 (Tenn. 1927), did not involve an action between an insured and insurer, but rather was a dispute between a trustee in bankruptcy and a town over who should receive the funds paid out on a previously compromised insurance claim. The insurer here was not a party to the action, having paid substantially less than the full coverage of $15,000.00 on a building. The replacement cost for this building was indicated to be somewhere between $50,000.00 and $100,000.00, but the court allowed the

proceeds to be used for the construction of a significantly smaller building in order to avoid a forfeiture on the part of the town for property that was being used for public purposes. It was not indicated in the court's opinion that a new building was ever constructed.

Also cited by the plaintiff was **United States Mortgage and Trust Co. v. New York Dock Co.**, 108 **Misc.** 120, 177 N.Y.S. 455, which involved a dispute over whether insurance funds already paid for a damaged and unprofitable grain elevator should be used to reimburse the company for repairs made on other property secured by a mortgage, or whether the funds should be used as a sinking fund to protect the mortgage. The question of whether the damaged structure should be replaced was not even before the court, nor was it within the realm of possibility since the replacement cost was estimated to be one and a half million dollars, ($1,500,000) and the insurance proceeds for the loss amounted to only $460,316.91. The court allowed the insurance funds to be used to reimburse the defendant company, since it had spent over one million one hundred and ninety five thousand dollars ($1,195,000.00) since the destruction of the grain elevator for improvements to the pier and other property secured by the mortgage, and noted that the mortgage covered this after acquired property which gave adequate protection to the mortgagee.

In addition, the plaintiff also cited **Ruter v. Northwestern Fire and Marine Insurance Co.**, 72 N.J. Super. 467, 178 A.2d 640 (1962) which is a lower New Jersey Court decision, and has not been used as an authority in any reported decisions. A thorough and well reasoned decision in the Supreme Court of Oregon in 1970, **Higgins v. Insurance Company of North America**, 256 Or. 166, 469 P. 2d 766, paused in a footnote to consider this decision, and dismissed its reasoning as "unpersuasive". Furthermore, the **Ruter** court was not faced with a policy provision, as

is this Court, that states that the repair or replacement of the property shall be "with material of like kind and quality". In the **Ruter** case, the Court in its decision left no guidance as to what would be a substantial compliance with the replacement provision of an insurance policy, since it failed to delineate specifically the variance in building sizes between that which had been destroyed and that which had replaced it. It might be assumed that the discrepancy was minimal since the entire claim comprised only approximately $3,300.00.

The Oregon Supreme Court in **Higgins**, in denying an insured any additional recovery over the actual cash value, considered several authorities in the insurance field in reaching its decision. The court noted generally, the requirements of the "replacement coverage" in relation to the payment under the "actual cash value" provisions and stated:

> "There is to be no recovery of the part of the loss which exceeds the actual cash value of the damaged part **unless and until actual repair or replacement is completed**. In other words, repair or replacement is **prerequisite** to recovery under the extension. The insured can submit a claim for **actual cash value** when he chooses and collect any **additional amount** he may have coming under the replacement cost extension subject to a requirement that the additional claim be made within 180 days after the loss." (emphasis by court.) **Higgins**, Id. at 776.

The Court went on to cite Magee and Bickelhaupt, **General Insurance** (7th ed. 1964) at 310:

> "In the usual course, liability under the policy accrues on the actual cash value basis until repair or replacement has actually been effected. This means that if the property is not repaired or replaced, the only liability of the company will be on the actual cash value basis." **Higgins**, Id. at 776.

cash value basis." **Higgins**, Id. at 776.

The court in **Higgins** also cited Mehr and Commack, **Principles of Insurance** (4th ed. 1966) at 202:

> "As is usual with replacement cost coverage, the contract provides that the company shall not be liable for any loss until the actual repair or replacement is completed. Also, the **measure of replacement cost** is the cost of replacing the building or any part of it with a **building identical to the insured building on the same premises and intended for the same occupancy and use.** (emphasis added) Furthermore, in no event can the recovery be more than the amount **actually** and **necessarily expended** in repairing or replacing the building intended for the same occupancy and use." (emphasis by the court.) **Higgins**, Id. at 776.

Several other recent cases have dealt with the question of replacement of a building under a fire policy. In the latest of these cases, **Lerer Realty Corp. v. MFB Mutual Insurance**, 474 F.2d 410 (C.A. 5th Cir. 1973) rehearing en banc denied, 477 F.2d 596, the court ordered that the insured, having failed to replace the destroyed building, was entitled only to the actual cash value of the building. In **Bourazak v. North River Insurance Company**, 379 F.2d 530 (C.A. 7th Cir. 1967), the court also denied recovery of the replacement value to the insured where the building was not replaced.

The defendant conducted its negotiations for the settlement with a view to its rights under the insurance policy. The relevant portions of that policy are as follows:

> "... does insure the insured name in the declarations above and the legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with

material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, ... Declarations page, part II."

"The company shall not be liable under this endorsement for any loss unless and until the damage or destroyed property is actually repaired or replaced by the insured with due diligence and dispatch.

"This company's liability for loss on a replacement cost basis, shall not exceed the smallest of the following amounts:

(b) the replacement cost of the property or any part identical with such property on the same premises and intended for the same occupancy and use; or

(c) the amount actually and necessarily expended in repairing or replacing said property or any part thereof.

The agreement of August 2, 1973, evidenced in part by the written settlement agreement, is not inconsistent with the insurance contract under which the plaintiff's right to the replacement cost of the building is derived, and should therefore be read together so as to arrive at the total understanding of the parties.

In granting the plaintiff's motion for summary judgment as already stated, the District Court disregarded claims of fact set forth in the defendant's affidavits. However, the court in its ruling on the motions for summary judgment found as established facts, certain claims of fact set forth in the affidavits of Attorney Samuel J. Heyman dated October 21, 1974 and November 13, 1974, which claims of fact were in no way admitted by the defendant. On page 3 of the Court's ruling the court

found that the plaintiff completed the building on August 22, 1973, in spite of the fact that it is alleged in paragraph 11 of the complaint that on or about August 22, 1973 the plaintiff notified the defendant that the walls and roof of the building had been completed.

On page 6 of the Court's ruling it is stated "at the time the settlement agreement was signed, the replacement building was already under construction; the foundation had been completed and the size of the new building could have been ascertained by a visual inspection. This statement appears in paragraph 4 of Mr. Heyman's affidavit of November 13, 1974, but the defendant at no time conceded the truth of this statement. We wish to strongly emphasize that the defendant was under no obligation to inspect the building while it was under construction to ascertain whether the building under construction was comparable to the building which had been destroyed by fire, as far as size, shape, etc. were concerned so that it could be considered to be an exact replacement. We maintain that it was incumbent upon the plaintiff to replace the earlier building with one which was its equivalent and that the defendant's position should not be prejudiced by the fact that it did not inspect the new building while it was under construction.

It is also apparent that the court relied heavily on the statement in paragraph 6 of Mr. Heyman's affidavit of November 13, 1974 that the sum of $187,500.00 would not have been accepted if such sum was offered subject to the requirement that the plaintiff construct a building identical in size to that which had been destroyed. In this respect the court disregarded the defend nt's affidavits stating that if the building was substantially restored to the same condition as it existed before the loss, the replacement cost would be $187,500.00.

In the course of preparing this brief it came to our

attention that the copy of the agreement dated August, 1973 which was attached to the copy of the complaint served on the defendant and which became a part of the file in this case when it was transferred from the Connecticut Superior Court to the U. S. District Court, is incomplete in that a line is missing. On discovering this we agreed with counsel for the plaintiff to stipulate that the record be corrected by filing a complete copy of the agreement.

Paragraph 2 of the agreement in the copy which was in the file when the case was decided by the U. S. District Court read as follows:

> "2. Payment of the $187,500 shall be made as follows: $150,000 to be paid, all cash, upon execution of this agreement and $37,500, to be paid, all cash, when insured has proceeded to the stage of construction of the new building where said building shall be watertight."

Paragraph 2 with the missing line included reads as follows:

> "2. Payment of the $187,500 shall be made as follows: $150,000 to be paid, all cash, upon execution of this agreement and $37,500, to be paid, all cash, when insured has proceeded to the stage of construction of the new building where said building shall be watertight — in other words, upon completion of construction of the walls and roof of said building."

On page 3 of the Court's ruling paragraph 2 is quoted as ending with the word "watertight". Moreover, on page 9 of the ruling the court stated "The only condition precedent to final payment provided that when the building was 'watertight', indicating an external completion of the structure, the balance of the total consideration would be paid." The court did not have the benefit of the

missing line "in other words, upon completion of construction of the walls and roof of said building." While it may be that there would have not been a difference in the result if the missing line had been before the Court, we nevertheless believe that we should explain this point in detail so as to avoid further confusion.

The plaintiff claimed that the agreement of August 2, 1973 was a novation, whereas the District Court in its ruling (page 7) considered the matter as a discharge by merger. Regardless of what legal terminology should be used to describe the agreement, it was an agreement to compromise a claim against an insurance company arising out of a fire loss covered by an insurance policy issued by the defendant to the plaintiff. Obviously, it is necessary to refer to the provisions of the policy to interpret the agreement. Whatever the plaintiff is entitled to under the agreement of August 2, 1973, is derived from the provisions of the policy, which of necessity form the basis for the compromise agreement which was reached. We maintain that the replacement cost clauses in the policy allow recovery of the replacement cost only if the original building was actually replaced by an equivalent building. The essence of the agreement of August 2, 1973 was that the actual cash value was $150,000.00 and the replacement cost, $187,500.00, and that the plaintiff was entitled to the full $187,500.00 only if the building was replaced pursuant to the plaintiff's intention as stated in the third whereas clause of the agreement.

CONCLUSION

In conclusion we submit that the judgment of the District Court should be reversed because it was based solely on the plaintiff's version of the agreement as set forth in the plaintiff's affidavits and the court disregarded the defendant's affidavits. The affidavits raised disputed

questions of material facts and presented a situation where the entry of summary judgment was inappropriate. Therefore, the plaintiff's motion for summary judgment should have been denied.

Respectfully submitted,

John Keogh, Jr.
Attorney for
Defendant-Appellant

Keogh, Candee & Burkhart
34 Wall Street
P. O. Box 126-Belden Station
Norwalk, Conn. 06852